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2004 Legislature

A bill to be entitled

An act relating to construction defects; amending s. 558.001, F.S.; revising legislative findings and declarations; amending s. 558.002, F.S.; revising definitions; amending s. 558.003, F.S.; providing requirements for filing actions alleging construction defects; requiring abatement, upon timely motion, of certain actions filed that do not comply with certain requirements; amending s. 558.004, F.S.; revising requirements, procedures, criteria, and limitations in provisions relating to notice and opportunity to repair construction defects in certain structures; providing requirements and procedures for making, accepting, or rejecting settlement offers; providing for consequences of certain actions relating to settlement offers; specifying legal obligation to make certain repairs or monetary payments under certain circumstances; providing a mutual duty to exchange certain discoverable evidence; providing requirements and limitations; amending s. 558.005, F.S.; revising certain contract content provisions; providing a notice form; providing application; providing severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 558.001, Florida Statutes, is amended to read:

558.001 Legislative findings and declaration.--The Legislature finds that it is beneficial to have an alternative

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method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of homeowners.

An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional with an opportunity to resolve the claim without resort to further legal process.

Section 2. Section 558.002, Florida Statutes, is amended to read:

558.002 Definitions.--As used in this chapter ~~act~~, the term:

(1) "Action" means any civil action or arbitration proceeding for damages or indemnity asserting a claim for damage to or loss of a dwelling or personal property caused by an alleged construction defect, but does not include any administrative action or any civil action or arbitration proceeding asserting a claim for alleged personal injuries arising out of an alleged construction defect.

(2) "Association" has the same meaning as in s. 718.103(2), s. 719.103(2), s. 720.301(7), or s. 723.025.

(3) "Claimant" means a homeowner, including a subsequent purchaser, ~~tenant~~, or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional.

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(4) "Construction defect" means a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of a dwelling, any appurtenance to the dwelling, or the real property to which the dwelling or appurtenance is affixed resulting from:

(a) Defective material, products, or components used in the construction or remodeling;

(b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84;

(c) A failure of the design of a dwelling to meet the applicable professional standards of care at the time of governmental approval; or

(d) A failure to construct or remodel a dwelling in accordance with accepted trade standards for good and workmanlike construction at the time of construction.

(5) "Contractor" means any person, as defined in s. 1.01, ~~firm, partnership, corporation, association, or other organization~~ that is legally engaged in the business of designing, developing, constructing, manufacturing, repairing ~~selling,~~ or remodeling dwellings or attachments thereto.

(6) "Design professional" means a person, as defined in s. 1.01, licensed in this state as an architect, interior designer, landscape architect, engineer, or surveyor.

(7) "Dwelling" means a single-family house, manufactured or modular home, duplex, triplex, quadruplex, or other multifamily unit in a multifamily residential building designed for residential use in which title to each individual unit is

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transferred to the owner under a condominium or cooperative system and includes common areas and improvements that are owned or maintained by an association or by members of an association, and also includes the systems, other components, and improvements, and other structures or facilities, including, but not limited to, recreational structures or facilities, that are appurtenant to and located on the real property on which the house, duplex, triplex, quadruplex, or other multifamily unit is located, but are not necessarily part of the structure at the time of completion of construction.

(8) "Service" means ~~personal service or~~ delivery by certified mail, return receipt requested, to the last known address of the addressee.

(9) "Subcontractor" means a person, as defined in s. 1.01, who is a contractor who performs labor and supplies material work on behalf of another contractor in the construction or remodeling of a dwelling.

(10) "Supplier" means a person, as defined in s. 1.01, who provides only materials, equipment, or other supplies for the construction or remodeling of a dwelling.

Section 3. Section 558.003, Florida Statutes, is amended to read:

558.003 Action; compliance abatement.--~~If~~ A claimant may not file files an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter ~~act~~, on timely motion by a party to the action the court shall abate the

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action, without prejudice, and the action may not proceed until the claimant has complied with such requirements.

Section 4. Section 558.004, Florida Statutes, is amended to read:

558.004 Notice and opportunity to repair.--

(1) In actions brought alleging a ~~against a contractor, subcontractor, supplier, or design professional~~ related to an alleged construction defect, the claimant shall, at least no later than 60 days before filing an action involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or at least 120 days before filing an action involving an association representing more than 20 residential parcel owners, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter. If the construction defect claim arises from work performed under a contract, the written notice of claim must be served on the person with whom the claimant contracted. The notice of claim must describe the claim in reasonable detail sufficient to determine the general nature of each alleged construction defect and a description of the damage or loss resulting from the defect, if known. The claimant shall endeavor to serve the notice of claim within 15 days after discovery of an alleged defect, but the failure to serve notice of claim within 15 days does not bar the filing of an action, subject to s. 558.003. This subsection does not preclude a claimant from filing an action sooner than 60 days, or 120 days as applicable, after service of written notice as expressly provided in subsection (6), subsection (7), or

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subsection (8).

(2) Within 30 ~~5-business~~ days after receipt ~~service~~ of the notice of claim, ~~the contractor, subcontractor, supplier, or design professional may inspect~~ involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or within 50 days after receipt of the notice of claim involving an association representing more than 20 residential parcels, the person receiving the notice of claim under subsection (1) is entitled to perform a reasonable inspection of the dwelling or of each unit subject to the claim to assess each alleged construction defect. An association's right to access property for either maintenance or repair includes the authority to grant access for the inspection. The claimant shall provide the person receiving the notice under subsection (1) and such person's contractor, subcontractor, supplier, or design professional and its contractors or agents reasonable access to the dwelling during normal working hours to inspect the dwelling to determine the nature and cause of each alleged construction defect and the nature and extent of any repairs or replacements necessary to remedy each defect. The person receiving notice under subsection (1) shall reasonably coordinate the timing and manner of any and all inspections with the claimant to minimize the number of inspections. The inspection may include destructive testing by mutual agreement under the following reasonable terms and conditions:

(a) If the person receiving notice under subsection (1) determines that destructive testing is necessary to determine the nature and cause of the alleged defects, such person shall

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notify the claimant in writing.

(b) The notice shall describe the destructive testing to be performed, the person selected to do the testing, the estimated anticipated damage and repairs to the dwelling resulting from the testing, the estimated amount of time necessary for the testing and to complete the repairs, and the financial responsibility offered for covering the costs of repairs.

(c) If the claimant promptly objects to the person selected to perform the destructive testing, the person receiving notice under subsection (1) shall provide the claimant with a list of three qualified persons from which the claimant may select one such person to perform the testing. The person selected to perform the testing shall operate as an agent or subcontractor of the person receiving notice under subsection (1) and shall communicate with, submit any reports to and be solely responsible to the person receiving notice.

(d) The testing shall be done at a mutually agreeable time.

(e) The claimant or a representative of the claimant may be present to observe the destructive testing.

(f) The destructive testing shall not render the dwelling uninhabitable.

In the event the claimant fails or refuses to agree to destructive testing, the claimant shall have no claim for damages which could have been avoided or mitigated had destructive testing been allowed when requested and had a feasible remedy been promptly implemented. ~~—Prior to~~

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~~performing any destructive testing, the person who desires to perform the testing shall notify the claimant in writing of the type of testing to be performed, the anticipated damage to the dwelling which will be caused by the testing, and the anticipated repairs that will be necessary to repair any damage caused by the testing. The person performing the testing is responsible for repairing any damage to the dwelling caused by the testing.~~

(3) Within 10 days after receipt ~~service~~ of the notice of claim involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or within 30 days after receipt of the notice of claim involving an association representing more than 20 residential parcels, the person receiving the notice under subsection (1) may ~~contractor, subcontractor, supplier, and design professional~~ must forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible. Each such contractor, subcontractor, supplier, and design professional may inspect the dwelling as provided in subsection (2) ~~within 5 business days after receiving a copy of the notice.~~

(4) Within 15 ~~5 business~~ days after receiving a copy of the notice of claim pursuant to subsection (3) involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a



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triplex, or a quadruplex, or within 30 days after receipt of the copy of the notice of claim involving an association representing more than 20 residential parcels, the contractor, subcontractor, supplier, or design professional must serve a written response to the person ~~contractor, subcontractor, supplier, or design professional~~ who forwarded ~~served~~ a copy of the notice of claim. The written response shall include a report, if any, of the scope of any inspection of the dwelling, the findings and results of the inspection, a statement of whether the contractor, subcontractor, supplier, or design professional is willing to make repairs to the dwelling or whether such ~~he or she~~ disputes the claim is disputed, a description of any repairs they are ~~he or she is~~ willing to make to remedy the alleged construction defect, and a timetable for the completion of such repairs.

(5) Within 45 ~~25~~ days after receiving the notice of claim involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or within 75 days after receipt of a copy of the notice of claim involving an association representing more than 20 residential parcels, the person who received notice under subsection (1) ~~each contractor, subcontractor, supplier, or design professional~~ must serve a written response to the claimant. The response shall be served to the attention of the person who signed the notice of claim, unless otherwise designated in the notice of claim. The written response must provide:

(a) A written offer to remedy the alleged construction defect at no cost to the claimant, ~~including a report of the~~

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~~scope of the inspection, the findings and results of the inspection,~~ a detailed description of the proposed repairs necessary to remedy the defect, and a timetable for the completion of such repairs;

(b) A written offer to compromise and settle the claim by monetary payment, that will not obligate the person's insurer, and a timetable for making payment to be paid within 30 days after the claimant's acceptance of the offer; ~~or~~

(c) A written offer to compromise and settle the claim by a combination of repairs and monetary payment, that will not obligate the person's insurer, that includes a detailed description of the proposed repairs and a timetable for the completion of such repairs and making payment;

~~(d)(e)~~ A written statement that the person contractor, ~~subcontractor, supplier, or design professional~~ disputes the claim and will not remedy the defect or compromise and settle the claim; ~~or-~~

(e) A written statement that a monetary payment, including insurance proceeds, if any, will be determined by the person's insurer within 30 days after notification to the insurer by means of forwarding the claim, which notification shall occur at the same time the claimant is notified of this settlement option, which the claimant can accept or reject. A written statement under this paragraph may also include an offer under paragraph (c), but such offer shall be contingent upon the claimant also accepting the determination of the insurer whether to make any monetary payment, in addition thereto. If the insurer for the person receiving the claim makes no response within the 30 days following notification, then the claimant

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shall be deemed to have met all conditions precedent to commencing an action.

~~(6) If the contractor, subcontractor, supplier, or design professional offers to remedy the alleged construction defect or compromise and settle the claim by monetary payment, the written response must contain a statement that the claimant shall be deemed to have accepted the offer if, within 15 days, or 45 days for an association, after service to the written response, the claimant does not serve a written rejection of the offer on the contractor, subcontractor, supplier, or design professional.~~

(6)(7) If the person receiving a notice of claim pursuant to subsection (1) contractor, subcontractor, supplier, or design professional disputes the claim and will neither remedy the defect nor compromise and settle the claim, or does not respond to the claimant's notice of claim within the time provided in subsection (5), the claimant may, without further notice, proceed with an action against that person ~~the contractor, subcontractor, supplier, or design professional~~ for the claim described in the notice of claim. Nothing in this chapter shall be construed to preclude a partial settlement or compromise of the claim as agreed to by the parties and, in that event, the claimant may, without further notice, proceed with an action on the unresolved portions of the claim.

(7)(8) A claimant who receives rejects a timely settlement offer must accept or reject the offer made by serving the contractor, subcontractor, supplier, or design professional must serve written notice of such acceptance or rejection on the person making the offer contractor, subcontractor, supplier, or design professional within 15 days, or 45 days for an

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~~association, after receiving service of the settlement offer. If a claimant initiates an action without first accepting or rejecting the offer, the court shall abate the action upon timely motion until the claimant complies with this subsection. The claimant's rejection must contain the settlement offer with the word "rejected" printed on it. After service of the rejection, the claimant may proceed with an action against the contractor, subcontractor, supplier, or design professional for the claims in the notice of claim without further notice.~~

~~(8)(9)~~ If the claimant timely and properly accepts the offer to repair an alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the claimant's dwelling during normal working hours to perform the repair by the agreed-upon timetable as stated in the offer. If the offeror of a contractor, subcontractor, supplier, or design professional and the contractor, subcontractor, supplier, or design professional does not make the payment or repair the defect within the agreed time and in the agreed manner, except for reasonable delays beyond the control of the offeror, including, but not limited to, weather conditions, delivery of materials, claimant's actions, or issuance of any required permits, the claimant may, without further notice, proceed with an action against the offeror based upon contractor, subcontractor, supplier, or design professional for the claim in the notice of claim. If the offeror a claimant accepts a contractor's, subcontractor's, supplier's, or design professional's offer and the contractor, subcontractor, supplier, or design professional makes payment or repairs the defect within the agreed time and in the agreed manner, the

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claimant is barred from proceeding with an action ~~against the contractor, subcontractor, supplier, or design professional~~ for the claim described in the notice of claim or as otherwise provided in the accepted settlement offer.

~~(10) If the claimant accepts the offer of a contractor, subcontractor, supplier, or design professional to repair an alleged construction defect, the claimant shall provide the contractor, subcontractor, supplier, or design professional and its contractors or other agents reasonable access to the claimant's dwelling during normal working hours to perform the repair by the agreed-upon timetable as stated in the offer.~~

~~(9)(11) The failure of a claimant or a contractor, subcontractor, supplier, or design professional to follow the procedures in this section is admissible in an action. However,~~ This section does not prohibit or limit the claimant from making any necessary emergency repairs to the dwelling as are required to protect the health, safety, and welfare of the claimant. In addition, any the offer or failure to offer pursuant to subsection (5) of a contractor, subcontractor, supplier, or design professional to remedy an alleged construction defect or to compromise and settle the claim by monetary payment does not constitute an admission of liability with respect to the defect and is not admissible in an action brought under this chapter.

~~(10)(12)~~ A claimant's mailing of the written notice of claim under subsection (1) tolls the applicable statute of limitations relating to any person covered by this chapter and any bond surety until the later of:

(a) Ninety Sixty days, or 120 days, as applicable, after receipt of the contractor, subcontractor, supplier, or design

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~~professional receives the notice of claim pursuant to subsection~~

(1); or

(b) Thirty days after the end of the repair period or payment period stated in the offer, if the claimant has accepted the offer. By stipulation of the parties, the period may be extended and the statute of limitations is tolled during the extension.

~~(11)(13)~~ The procedures in this chapter section apply to each alleged construction defect. However, a claimant may include multiple defects in one notice of claim. The initial list of construction defects may be amended by the claimant to identify additional or new construction defects as they become known to the claimant. The court shall allow the action to proceed to trial only as to alleged construction defects that were noticed and for which the claimant has complied with this chapter and as to construction defects reasonably related to, or caused by, the construction defects previously noticed. Nothing in this subsection shall preclude subsequent or further actions.

~~(12)(14)~~ This chapter does Sections 558.001-558.003 of this act do not:

(a) Bar or limit any rights, including the right of specific performance to the extent such right would be available in the absence of this act, any causes of action, or any theories on which liability may be based, except as specifically provided in this chapter act;

(b) Bar or limit any defense, or create any new defense, except as specifically provided in this chapter act; or

(c) Create any new rights, causes of action, or theories on which liability may be based.

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(13) Nothing in this section shall relieve the person receiving notice of claim under subsection (1) from complying with all contractual provisions of any liability insurance policy as a condition precedent to coverage for any claim under this section. However, notwithstanding the foregoing or any contractual provision, the providing of a copy of such notice to the person's insurer, if applicable, shall not constitute a claim for insurance purposes. Nothing in this section shall be construed to impair technical notice provisions or requirements of the liability policy or alter, amend, or change existing Florida law relating to rights between insureds and insurers except as otherwise specifically provided herein.

(14)~~(15)~~ To the extent that an arbitration clause in a contract for the sale, design, construction, or remodeling of a dwelling conflicts with this section, this section shall control.

(15) Upon request, the claimant and the person receiving notice pursuant to subsection (1) shall have a mutual duty to exchange all available discoverable evidence relating to the construction defects, including, but not limited to, expert reports, photographs, information received pursuant to subsection (4), and videotapes, if any. In the event of subsequent litigation, any party who failed to provide such evidence shall be subject to such sanctions as the court may impose for a discovery violation. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or

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relied upon by an expert who testifies on behalf of the party  
for whom the report was prepared.

Section 5. Section 558.005, Florida Statutes, is amended to read:

558.005 ~~Contract of sale;~~ provisions; application.--

(1) Except as otherwise provided in subsections (3) and (4), the provisions of this chapter shall control every contract for the design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, which contains the notice as set forth in subsection (2) and is conspicuously set forth in capitalized letters ~~Upon entering into a contract for the sale, design, construction, or remodeling of a dwelling, the contractor, subcontractor, supplier, or design professional shall provide notice to the owner of the dwelling of the contractor's, subcontractor's, supplier's, or design professional's right to offer to cure construction defects or pay to settle alleged construction defects before a claimant may commence an action against the contractor, subcontractor, supplier, or design professional. Such notice must be conspicuous and may be included as part of the contract.~~

(2) The notice required by subsection (1) must be in substantially the following form:

CHAPTER 558 NOTICE OF CLAIM

CHAPTER 558, FLORIDA STATUTES ~~LAW~~ CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION ~~FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST A CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR DESIGN PROFESSIONAL~~ FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE



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YOU BRING ANY LEGAL ACTION ~~FILE YOUR LAWSUIT~~, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT ~~CONTRACTOR, SUBCONTRACTOR, SUPPLIER, OR DESIGN PROFESSIONAL~~ A WRITTEN NOTICE REFERRING TO CHAPTER 558 OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON ~~YOUR CONTRACTOR AND ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS~~ THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING ~~MAKE~~ AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE ~~BY THE CONTRACTOR OR ANY SUBCONTRACTORS, SUPPLIERS, OR DESIGN PROFESSIONALS~~. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.

(3) After receipt of the initial notice of claim, a claimant and the person receiving notice under s. 558.004(1) may, by written mutual agreement, alter the procedure for the notice of claim process described in this chapter.

(4) This chapter applies to all actions accruing on or after July 1, 2004, and all actions commenced on or after such date, regardless of the date of sale, issuance of a certificate of occupancy or its equivalent, or substantial completion of the dwelling. Notwithstanding the notice requirements of this section for contracts entered into on or after July 1, 2004, this chapter applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and failure to include the notice requirements of this section in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of this chapter from applying to all such actions.

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Section 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 7. This act shall take effect July 1, 2004.